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IMPORTANT DECISIONS

JUSTICE KRISHNA IYER'S LAST JUDGMENT — A STUDY OF SOME IMPORTANT OBSERVATIONS*

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1. In a land mark judgment,[1] Justice Krishna Iyer made certain important observations which need a study to find out how realistic they are even today i.e., 34 years after his retirement. These observations are extracted from the judgment for the purposes of present study.

2. Justice Krishna Iyer observes:- "The abolition of slavery has gone on for a long time. Rome abolished slavery, America abolished it, and we did,[2] but only the words were abolished, not the thing"[3]. (Para 1)

Art 23(1) provides thus:-

"Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law...."

Parliament enacted the "Bonded Labour System (Abolition) Act, 1976" to give effect to Art. 23 which abolished the system of bonded labour and declared it as illegal and punishable.[4]

3. Despite the fact 'slavery' has not been mentioned in Art. 23, it is covered within the expression 'traffic in human beings'.[5] In a general sense, traffic in human beings would mean treating human beings as goods and will include dealings of human-beings for sale or commercial purpose, as well as for "immoral or other purposes".[6] Importing, exporting, removing, buying or selling or disposing of any person as a slave or accepting, receiving or detaining against the will of any person as a slave is made punishable.[7] For acts of 'traffic in human-beings', a law has been specifically enacted to punish such acts.[8]

4. The expression 'begar' means involuntary work done where no payment is made and no one can be forced to work without wages or payment which is totally inadequate. However, if the extra work is done voluntarily for payment, it does not constitute 'begar'.[9] A custom prevalent in Manipur State that the house-holders in the village shall offer one day's free labour to the headman of the village was struck down as violation of Art. 23 of the Constitution[10]. There are many instances in the present day that there are many children, women and workers kept under custody by groups and work extracted without payment or inadequate payment, the press had exposed such instances. In other words, Justice Krishna Iyer's observation that we have abolished slavery in words only, the validity of which cannot be questioned in terms of societal situation that exists in some form or the other slavery or conditions similar to that.

II) ..... "the fundamental right of equality of opportunity has to be read as justifying the categorization of SCs and STs separately for the purpose of "adequate representation" in the services under the State. The object is constitutionally sanctioned in terms of Art. 16(4) of the Fundamental Rights and Art. 46 of the Directive Principles of State Policy (underline-supplied) (Para 76).[11]

1. AIR 1981 SC 298.
2. See Art. 23 of the Constitution.
3. See Para 1 of the judgment
4. See Section 370 of the Indian Penal Code.
5. Dubar v. Union of India AIR 1952 Cal 496.
6. Raj Bahadur v. Legal Remembrancer AIR 1953 Cal 522.
7. See Section 370 of the Indian Penal Code.
8. See for details the Immoral Traffic (Prevention) Act, 1956.
9. Shama Bai v. State of U. P. AIR 1959 All 57.
10. Kashaosan Thangkhul v. Simirei Shailei AIR 1961 Mani 1.
11. See Para 76 of the Judgment for details.

*Judgment delivered on 14-11-1980 in Akhil Bharatiya Soshit Karmachari Sangh (Railway) v. Union of India, AIR 1981 SC 298.

These observations of Justice Krishna Iyer are relevant even today.

Art. 16(4) in dealing with equality of opportunity in matters of public employed provides thus:-

"Nothing in the above article shall prevent the State from making any provision for the reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State".

Art. 16(4-A) "Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion with consequential seniority to any class or classes of posts under the State in favour of Scheduled Class and the Scheduled Tribes, which in the opinion of the State are not adequately represented in the services under the State".

Reservation of vacancies of teaching staff in registered private schools for Scheduled Castes and Scheduled Tribes has been upheld.[12] Reservation under Art. 16(4) may be made in the exercise of executive power without any legislative support.[13] It has been held that Art. 16(4) is not an exception to Art. 16(1) but rather a facet of equality of opportunity in the matter of employment.[14] Justice Krishna Iyer's post-retirement period decisions of the court clearly demonstrated the truth in the observation of Mr. Justice Krishna Iyer.

III) The court has its limitation unlike the administration and can give justice only under the Constitution and not over it (Para 100).[15]

The Supreme Court has emphasized that the court and the State must act in collaboration and co-operation in enforcing Fundamental Rights.[16] This statement reinforces the view of Mr. Justice Iyer that the court's power to do justice is limited by the Constitution, but the State (executive) can use wide power to do justice by providing remedy to cases where the law does not specifically provide, except where such action does not come into conflict with the Constitution or any other law for the time being in force. It is nearly after several years, this has been realised that the judiciary and executive acting together can do complete justice. Cases may be cited where the Supreme Court has limitations under Art.32 to give justice. They may be stated thus:-

i) To direct the Constitution of a legal Municipal Board.[17] However, if the Administration desires, it can be constituted immediately;

ii) It cannot fix the pay-scale of employees.[18] The State can do it expeditiously;

iii) It cannot direct the legislatures to make any particular law.[19] The State can make any law expeditiously and if the legislature is not in session, it can get an ordinance issued to bring into force with immediate effect.

iv) It cannot ask the Government to take any policy decision.[20] Courts have always taken the view that the policy decisions of the Government cannot be interfered with unless they are repugnant to the Constitution or of Fundamental Rights.

v) Right to contest or vote in an election which cannot be enforced under Art. 32,[21] as it is only a statutory and not a fundamental right. The Election Officer or Presiding Officer can allow all these, if he is satisfied that the claimant is entitled to do it.

vi) It cannot issue a direction to High Court to pronounce the judgment in a case which it has reserved long ago.[22] However, the Chief

12. Bharat Sevashram Sangh v. State of Gujarat, AIR 1987 SC 494.
13. CAG of India v. Mohan Lal Mehrotra, AIR 1991 SC 2288.
14. See for details M.Nagaraj v. Union of India, AIR 2007 SC 71.
15. See for details Para 100 of the last judgment
16. Gaurar Jain v. Union of India, AIR 1997 SC 3021.
17. Nair Sukh Das v. State of U. P., AIR 1933 SC 35.
18. Supreme Court Employees Welfare Association v. Union of India, AIR 1990 851
19. Ibid
20. Union of India v. Tajram Paresh Ramji Bombhate, AIR 1992 SC 570.
21. Ramakanth Panday's case, AIR 1993 SC 1766
22. See for details S.L.Varma's case (2003) 10 SCC 243.

Justice or the Judge concerned can deliver the judgment at any time he is free to do so or thinks that it is necessary to pronounce in the interests of justice; and

vii) In cases of breach of contract, Art. 32 cannot be invoked where disputed facts are involved.[23]

The above cases clearly demonstrate that the Supreme Court's power under Art. 32 is much restricted or limited, while such cases can be disposed of judiciously by an administrative authority quickly and expeditiously. Justice Krishna Iyer's observation holds good even today whose sense of forseeability of legal development can easily be evidenced. In fact, the observation made is the positive evidence that Justice Iyer believed in "co-operative federalism" which can be a doctrine of high value promoting progress and development of nation as a whole.

IV) Given the opportunity and the environment, the Indian dalits can make India great, and give up crutches (Para 104 of the judgment).[24]

Art. 46 of the Directive Principles of State Policy relates to the obligation of the State to promote the educational and economic interests of backward class or of the weaker sections of the people, and in particular of the Scheduled Castes and the Scheduled Tribes and shall protect them from social injustice and all forms of exploitation. The Supreme Court was able to find the 'right to development' in this Article (Art. 46) read with Art. 21, 38 and 39 of the Constitution.[25] Justice Krishna Iyer's observation specifically emphasises, that if Arts. 38 and 39 along with Art. 21 are implemented according to the 'spirit and letter' of these provisions, it would definitely usher in the promotion of the right to development of all sections including Scheduled Castes and Scheduled Tribes so that SCs and STs will really make India great. Samantha's case[26] bears adequate testimony to the observations of Mr. Justice Iyer (1980) very relevant even in 1997 (Samantha's case). There is no denial of the fact that Modi Govt. came to power by professing the 'development mantra' which is on its way to create history by 'Swattch Bharath' and the attempts to provide a transparent democratic rule ushering in E-governance. There is no doubt whatsoever that Mr. Justice Krishna Iyer championed the cause of 'social justice' within the frame-work of constitutional limits.

The expression 'weaker sections of the society' has not been defined in the Constitution. It goes to the credit of the judiciary to give a rationale meaning to it by applying the 'means test'[27] which is now being applied by various Governments in India in determining the eligibility for housing allotment and various poverty alleviation programmes. Mr. Justice Krishna Iyer was equally conscious that the system of reservation for SC, ST and others shall in no way distract "from the maintenance of an efficient administration and the advancement of Scheduled Castes or Scheduled Tribes the maintenance of efficient administration shall not be impaired.[28] It is a very happy development to see that SCs and STs are occupying several prestigious positions in public life to indicate that given some more opportunities, they shall make India really great. It is equally relevant to assert that

23. Defence Enclave Residents' Society v. State of U. P., AIR 2004 SC 4877.

24. For details refer para 104 of the last judgment which has been studied in this work.

25. Samatha v. State of A. P., AIR 1997 SC 3297.

Art. 21 deals with right to life and personal liberty which could be viewed as 'inexhaustible source of many other rights – like right to food, shelter, clothing, means of livelihood, live with human dignity and self-respect etc.

Art. 38 of the Directive Principles of State Policy imposes obligation on the State to secure a social order for the promotion of welfare of the people and Art. 39 enumerates certain principles to promote the welfare of the people such as adequate means of livelihood, equal pay for equal work and fair distribution of wealth etc.

26. Ibid

27. Shantistar Builders v. Narayana Khimalal Tatame, AIR 1996 SC 630.

28. See para 108 of the best judgment.

Mr. Justice O. Chinna Reddy (a concurring Judge in the last judgment case) described Mr. Justice Krishna Iyer's views, his reasoning and conclusions are in full agreement with him and needed no addition. It is a rich tribute from a Brother Judge.

V) To conclude, an observation of a former C ef Justice of Supreme Court (Mr. Justice K. Sadasivam) presently the Governor) is apt and worthy of reproduction. It is in these terms " " .... Mr. Iyer was a light house to practitioners of law, guiding them through the right path towards justice. His innovative interpretation of statutes and development of poverty jurisprudence and third world vision of social justice had won wide appreciation ..... His timely interpretation and intervention have opened the doors of justice for the oppressed classes....."[29] There is no denial of the fact that persons like Mr. Justice Krishna Iyer have made all that which constitutes "Indian Judiciary" and strong pillars on which it stands today, and the young generation have a great responsibility to see that it is maintained, preserved, developed and to defend it from being destroyed.

A glowing tribute that the legal fraternity can pay to Mr. Justice Iyer is to implement his idea on "Judicial performance commission". 'Advocate performance commission' and a comprehensive constitutional code for the Bench and the Bar, so as to ensure 'Rule of Law' and 'Rule of Justice' may meaningfully serve the rule of life.[30]

29. The Hindu Publication dated 17-11-2014 at Page 6 (Hyd. City Edition) reporting the speech of Mr. Justice R. Sadasivam while presiding over the centenary celebrations of Mr. Justice Krishna Iyer on 16-11-2014.

30. Justice V. R. Krishna Iyer 'Dynamic Lawyering' Universal Law Publishing Co., 2009 P.6-7.

'PLACE OF APPOINTMENT' : A MUCH NEGLECTED BUT CRUCIAL FACTOR IN BRINGING INDIAN JUDICIAL REFORMS

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INTRODUCTION

The 14th Law Commision of India Report, 1958, *inter alia,* expressed the need for the Judges to keep themselves detached and have less local connections so that their contacts may not be such as to embarrass them in the discharge of their duties or they be considered impartial by reason of their contacts or connections.[1] Though narrowly expressed only in context of pronouncing the judgments, this apt concern of the then eminent members of the Commission[2] has unfortunately gone unnoticed despite its very wide potential application in the sphere of judicial independence which is now posing grave challenges to the entire judiciary. Of lately, from appointments to administration of justice, there has been a spate of allegations of corruption and bias against the sitting Judges which has not only degenerated the honour of judiciary but has also sparked a consensus to change the entire appointment and transfer process of Judges by appointing a National Judicial Appointment Commission (hereinafter NJAC).[3] Presently not in force, NJAC Bill has also raised controversy with some thinkers arguing it as a violator of the basic structure doctrine of which judicial independence forms a primal part.[4]

1. Fourteenth Report, Law Commission of India, "Reform of Judicial Administration', 1958, at p. 99.

2. Mr. M. C. Setalvad (Chairman), M. C. Chagla, K. N. Wanchoo, S. M. Sikri, G. S. Pathak to name a few.

3. National Judicial Appointment Commission (NJAC) Bill, 2014 has been passed by the Parliament along with 121st Constitutional Amendment Bill to insert Art. 124A in the Constitution after Rajya Sabha approved it on August 14, 2014.

4. Supreme Court Advocate on Record Asso. v. Union of India, Manohar Lal Sharma v. Union of India, R. K. Kapoor v. Union of India and Ors., Bishwajit Bhattacharya

The article critiques the adopted methods of appointing Judges till now which have afflicted the 'independence of judiciary' in its proper functioning. To this end, this article is divided into three parts : Part A provides a brief narrative of the failure of appointment methods adopted so far followed by their respective reasons. It also describes the foreseen flaws associated with the concept of NJAC; Part B proposes an inquiry into the doctrine of judicial independence and its wide scope in context of the judicial appointments and related flaws in the present hierarchy; Part C combines the inferences drawn from both the above parts to suggest a workable solution to restore the public faith in the judiciary while maintaining its independence.

A. FAILURE OF JUDICIAL APPOINTMENT METHODS ADOPTED SO FAR

From the executive led appointments before the Second Judges' case[5] (1950-93) to the present collegium system thereafter, none has worked satisfactarily for India. The former method saw an era of pliant Judges[6] and the bold ones who dared raise voice against the ruling Government were either transferred to a less preferable place or superseded by others due to which many deserving candidates either resigned or had to compromise their illuminating career.[7] Though the First Judges' case[8] gave voice to the opinion of the Chief Justice of India (hereinafter CJI) which was ordinarily not to be departed from, however, the executive had the last say in the appointment and transfer process. Succinctly, this method went against Nehru's words that Judges would be "people who can stand up against the executive Government and whoever may come in their way".[9]

The latter method was thus introduced with a view to avoid any political interference in the appointment process. It realized the view but the Courts unexpectedly became a breeding ground for lobbyism. Instances rose where Judges forming part of the collegium, either because of local influence or to meet out their personal motives, started recommending names of the candidates otherwise not meritorious or unworthy of becoming a Judge. Admittedly, injustice was done in some cases[10] while grave allegations of corruption and undue favors blemished the public image of judiciary. Again, it went away to Nehru's words that our Judges should be "first-rate" men of "the highest integrity".[11]

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v. Union of India were Public Interest Litigations filed in the Supreme Court challenging NJAC Bill along with 121st Constitutional Amendment Bill.

5. Supreme Court Advocates-on-Record Association v. Union of India, AIR 1994 SC 268.
6. Nani A. Palkhivala, 'We, the Nation, The Lost Decades', UBS Publishers, 2014 at P. 219. See also, Soli J. Sorabjee and Arvind P. Datar, 'Nani Palkhivala, The Courtroom Genius', 2012 at p. 165. The Supreme Court dealt a fatal blow to liberty and during the Emergency enabled the imprisonment or detention of any person without trial in the infamous A.D.M. Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
7. Amongst many others, two such instances of disgraceful supersession in the Supreme Court have been that of Justice A. N. Ray superseding Justices J.M. Shelat, K. S. Hegde and A. N. Grover to become the CJI after the Kesavananda Bharati case and Justice M. H. Beg getting appointed as the CJI superseding Justice H. R. Khanna after the A. D. M. Jabalpur case. In both the cases, all the superseded Judges resigned.
8. S. P. Gupta v. Union of India, AIR 1982 SC 149; overruled by the Second Judges' case.
9. Constitution Assembly Debates, Vol. VIII, (Delhi : Lok Sabha Secretariat, 2003) pp. 246-247 (24th May, 1949).
10. Interview with Justice B. N. Agrawal, 'Judges could meet the same fate as Guvs', The Economic Times, August 27, 2014 at p. 4. Can be accessed at http://economictimes.indiatimes.com/news/politics-and-nation/Judges-could-meet-the-same-fate-as-governors-justice-bn-agrawal/articleshow/40956296.cms
11. Supra, No. 9.

A. I. Reasons for public resentment against the appointment methods

In public diaspora, the methods of judicial appointments and transfers, particularly at the higher forums, have always been subjected to criticism and debates.[12] It is mainly because of the reason that they are man-made policies marked by necessary evil of secrecy and regulated by human conduct which is susceptible to influence and hence, incapable of guaranteeing absolute fairness. On one hand, the whole and sole purpose of inserting the present Arts. 124 and 217 of the Constitution.[13] as understood, was to create the position of a Judge who held extremely important positions and the incumbent were not only erudite, diligent, impartial and independent, but whose appointment was also fair and transparent. While on the other hand, the judicial appointment process per se is covered by the blanket of Official Secrets Act, 1923 and does not fall under the ambit of Right to Information Act, 2005 thereby making it beyond public reach. It is this jurisprudentially ironic process immeasurable on the scale of transparency wholly depending upon the idiosyncratic virtues of the electors which causes sporadic doubts in public mind as to fairness in the appointment of Judges.

A.II. National Judicial Appointments Commission (NJAC) : A skeptical concept

NJAC seeks to constitute a pool of executive, Judges and eminent jurists to take over the task of appointing Judges.[14] One may argue the whole premise of setting up NJAC as it not only seems to violate the basic structure doctrine by opening the door ajar for the executive again to sneak into the independence of judiciary but it may also be inferred that NJAC is a combination of two dud schemes of appointments which pretentiously proclaims to succeed despite their individual failures. Further, the credibility of the eminent jurists which it proposes to comprise will always invite more questions than it will answer.

B. JUDICIAL INDEPENDENCE : A NEW APPROACH

The doctrine of judicial independence, if understood in its literal sense, would imply no external influence of any sense in a judicial process. According to this interpretation, the varying degree of the phrase 'of any sense' would decide the nature and extent of independence and the magnitude of interference exercised by others in a judicial process. However, when approached unconventionally, this doctrine demonstrates that although its application has been perceived well against the external interference affecting conduct of a Judge, unfortunately, the same has not been contemplated with respect to interference within the judicial setup. In India, the extent of external intervention by the legislature and the executive is supposed to be very marginal with respect to a judicial process[15] but there is a paucity of checks when it comes to internal interference by a Judge in the appointment or working of another Judge.

In view of external interference, some of the characteristics considered quintessential for impartial adjudication of a dispute are as follows :[16]

12. The latest criticism of the collegium system came from Justice Markandey Katju, Chairman, Press Council of India, who claimed that three ex-Chief Justices of India made "improper compromises" during UPA rule in retaining a Judge in Tamil Nadu under corruption cloud. July 21, 2014. Can be assessed at http://economictimes.indiatimes.com/opinion/comments-analysis/justice-markandey-katjus-expose-how-a-corrupt-judge-continued-in-madras-high-Court/articleshow/38782787.cms.curpg=2

13. Under Arts. 124 and 217 of the Indian Constitution, qualification, eligibility and procedure for appointing a Supreme Court Judge and a High Court Judge are given respectively.

14. Art. 124A(1) of the proposed 121st Amendment Bill, 2014 to the Constitution of India.

15. Art. 50, Constitution of India, 1950.

16. Sengupta, Arghya, 'Judicial Independence and the Appointment of Judges to the Higher Judiciary in India : A Conceptual Enquiry'; 5 Indian Journal of Constitutional Law, 2011 at p. 99.

1. The Judge should not be related to either of the parties in any way.

2. He should not be in a position to be influenced by the parties or their agents.

3. He should be safeguarded from threats from the parties or their agents.

4. He should carry on proceedings openly.

5. He should hear the parties fully and adequately.

6. He should base his decision on reasons which are valid and relevant. Though they may not be found inherently in a singled out Judge at a given point of time, they can, however be systematically imbued in the system.

Whereas in view of internal interference, a Judge should be able to perform all his functions independently without the following :

1. Any kind of fear, threat or pressure, express or implied, accruing from another Judge or by any other person in his name directly or indirectly.

2. Any imposed appeasement in the garb of an obligation to another Judge.

3. Any imposed conduct demeaning judicial propriety in the name of protocol towards another Judge.

Appointment of Judges is just one elementary fragment of the judicial process and in light of both the above-mentioned non-exhaustive lists, formulation of any scheme of judicial appointments must aim to safeguard the independence of judiciary as a whole even when the incumbent Judge is discharging his duties. Suppose a deserving candidate is appointed Judge by the fairest method but cannot exercise his powers freely in the administration of justice without fear, favor or ill-will; he cannot be said to be an independent Judge. Therefore, it becomes necessary to analyze the presence of these characteristics in our current judicial setup to decide how independent our judiciary is and whether the extent of independence serves the rationale of it being adequately impartial.

B. I. Present regime of appointments in the judicial hierarchy

As per the current regime of appointments in the Indian judiciary, the First Class Magistrates at the entry level are appointed by an examination followed by an interview which a candidate has to clear to procure a seat. With gradual promotions, an entry level Magistrate becomes a State Higher Judicial Services Officer while the alternate way to attain the same position is through an examination which an advocate, after the standing of 7 years at the Bar, is eligible to take.[17] Interview and training follow. The office of the District & Sessions Judge lies up in the hierarchy just below the position of a High Court Judge. A candidate may qualify to become a High Court Judge either by way of promotion or through direct elevation of an advocate having 10 years of standing before the High Court.[18] Respective High Court Collegiums send the recommendations of both the advocates as well as subordinate Judges to the Supreme Court Collegium for appointments to the High Courts. The ratio of subordinate Judges to advocates in such elevation is 1:2. Thereafter, up the ladder comes to post of the Chief Justice of a High Court who assumes control as head of the State judiciary, positioned just below the Supreme Court Judge and CJI at the helm. The CJI is generally appointed seniority-wise though it is not a straightjacket rule. Unlike a High Court Judge, a distinguished jurist in the eyes of the President may also be appointed a Supreme Court Judge.[19]

B.II. India's judicial hierarchy vis-a-vis independence of judiciary

When the structure of the judicial hierarchy is arranged vis-a-vis the characteristics of an independent Judge, following flaws are conspicuously observed :—

1. It takes an entry level Magistrate unreasonably long time by way of gradual promotions to become a High Court Judge and rarely a Supreme Court Judge.[20] The advocates who get direct recruitment to the District Judge cadre are placed ahead in the list of seniority

17. Art. 233(3) of the Constitution.

18. Id., Art. 217(2).

19. Id., Art. 214(3)(c).

20. Since 1990, only Justice M. Fathima Beevi and Justice Prafulla Chandra Pant have made it to the Supreme Court from the Magistrate level.

which then makes up the one-third Judges' quota in the High Courts.[21] With such a narrow scope for promotion, a subordinate Judge is left with no option but to keep himself in the good books of the local Bar apprehending the consequences in case any hostile advocate is appointed his senior in future thereby compromising the authority of Courts.

2. High Court Judges are mostly appointed in the same State where they have actively practised in the past. It not only increases the 'uncle-Judge' syndrome but also raises doubt as to how can a High Court Judge, who has earlier practised law for decades together in the same Court, be expected of not getting swayed away by any of his intimate local contact or remain unaffected by any of his past work associated relationship and become neutral leaving behind all his grudges against some which he endured for several years? Further, if he actively used to participate in the Bar elections and knows the associated politics inside-out, how can he later be expected to discharge his duties without any favour or ill-will affecting his interest?

3. Since advocates-appointed-Judges comprise the majority strength in the High Courts, they form the majority in the respective Administrative Committees as well. Thus, in cases of illegal strikes by lawyers,[22] how could one expect of the lawyer turned Judges to effectively control their past colleagues without compromising the authority of Courts? Moreover, it seems unrealistic for the advocates-appointed-Judges to make the protectors arrive at an immediate solution owing to their inter se intimate link with the local Bar which they themselves previously formed the part of.

4. A Judge, bound by the judicial discipline, is supposed to keep a restricted social life which an advocate-appointed-Judge can logically not be expected of owing to his past professional attribute. Thus, if appointed a Judge in the same State, how can an advocate be expected to suddenly cut loose his past contacts and restrict himself within the boundaries of judicial discipline.

5. An advocate, when appointed a High Court Judge, becomes senior to the subordinate Court Judge before whom he earlier used to appear in the capacity of a counsel. It demands serious contemplation to protect the legitimate interests of the subordinate Judge in the aftermath of change of rank so that he is not subjected to any uncongenial atmosphere by his senior to avenge any past ill-experience in the courtroom if any.

6. Collegiums of the High Courts as well as the Supreme Court mostly consist of advocates-appointed-Judges which, in the light of above points, creates a tint of doubt as to fairness and independent selection of the candidates when recommendations are sent for appointments of new Judges given that the whole process proceeds behind the closed doors.

7. There is a constitutional provision which enables a distinguished jurist who has never had any stint at the Bar, to be appointed a Supreme Court Judge. This provision was inserted to add a flavor of diversity to the Bench but unfortunately, India has never witnessed any such invitation to a legal scholar or a law professor till now.

B.III. Factors demanding judicial reforms in the current scenario

Points 1 to 6 in the above-mentioned list stand in direct conflict with the independence of judiciary. Though the Supreme Court as well as High Courts comprise mostly of advocates-appointed-Judges, the conflict seems to exacerbate in case of the High Courts. The major reason being that the Supreme Court not only maintains very high standards for appointing its Judges who mostly have prior judicial experience of the High Courts at length but it also appoints them from a wider spectrum covering all the States in their fixed representations unlike all the High Courts with excessive local appointments. It lessens parochial tendencies and foster a greater sense of

21. For a detailed account of the State-wise direct recruit to promotee ratio in the State Higher Judicial Service, see http://www.kar.nic.im/fnipc/dist_jud.htm.

22. Ex-Capt. Harish Uppal v. Union of India, AIR 2003 SC 739. A three Judge bench of the Supreme Court declared the law in no uncertain terms against lawyers going on strike as illegal.

justice in the Supreme Court.

Notwithstanding the supremacy of the Judges of the Supreme Court, all the High Court Judges at the commencement of our Constitution stood at par with them in their pristine integrity and command for respect. Often, the High Courts themselves used to respectfully invite the most competent leading members of the Bar to accept Judgeships unlike today and the sitting Judges, without a hitch, used to resign on account of their inability to discharge duties properly or in cases of allegations against them. That charm and legacy is somehow at diminution today in the profession of law for money and want of position have taken prominence with time so much so that false allegations, illicit transactions, undue favors and malicious innuendos have become part and parcel of the profession turned business.[23] The Judges too being humans, cannot be expected to develop inborn immunity against this horrendous epidemic. Nevertheless, what is alarming in this light is the grave remark "something is rotten in the Allahabad High Court"[24] by the Supreme Court itself which forces to introspect whether in the lifespan of 65 years of our dynamic Constitution, have we really struck the right constitutional chord of judicial propriety which its draftsmen wanted us to strike in the first place.

C. SUGGESTIONS AS TO REFORMS IN THE 'PLACE OF APPOINTMENT'

To devise a measure to restore judicial independence without violating public trust while maintaining official secrecy, following changes are suggested in the judicial appointments process :

1. At the very inception of their appointment, appoint all the advocates as Judges to the High Courts of States outside their respective domicile States in a fixed representation as is maintained by the Supreme Court.

2. Select and appoint all the advocates to the State Higher Judicial Services of other States outside their respective domicile States.

Though these suggestions prima facie appear to carry undercurrents of resentment against the interest of advocates, they are based on the existing rational policy of appointments and transfers of the Chief Justices of the High Courts who are always appointed from an outside State. Similarly, the lower Court Judges are neither appointed nor transferred to their respective home districts.

C.I. Projected effects of the Suggestions

What has trapped independence of judiciary the most today is the ever increasing allegations against the Judges and declining public faith in the judiciary. More than appointing NJAC or a Lokpal, what I feel imperative today in this backdrop is to sow these two seeds of change which will reap several positive results in the following manner :

The Supreme Court

Alleged lobbyism coupled with secret quid pro quo in the Supreme Court for undeserving appointments to the High Courts will curb down significantly as the shuffled collegiums of the High Courts comprising of diverse Judges, beyond any local influence or obligation, will send immaculate recommendations to the Supreme Court collegium sans any peer pressure or biased coterie of errant Judges. This will ultimately regulate the conduct of the Supreme Court itself when the deserving Judges from High Courts get promoted to that level.

The High Courts

Wanton allegations of 'uncle Judge syndrome' will reduce. Further, much required internal cleansing of the institution will take place and proclivity of the Judges to get swayed by reason of their intimate local contacts will fade. It is not that a Judge from an outside State is incapable of making local connections but the degree of intimacy attached to them is always less. Thus, the High Courts will exude better judicial discipline and the respective Administrative Committees will be able to take stringent actions in safeguarding the authority of Courts in cases of illegal strikes. Further, the local Bar, which is de facto not

23. See Nani A. Palkhivala, 'We, the Nation, The Lost Decades', supra n. 6, at p. 220; see also Fali S. Nariman, 'Before Memory Fades: An Autobiography', Hay House India, 2010 at p. 81.

24. Raja Khan v. U. P. Sunni Central Wakf Board & Anr. 2010 AIR SCW 2758.

exposed to the working of other High Courts, will benefit from the opportunity to appear before the Judges belonging to different cultures, backgrounds and orientations. It will not only reduce sycophancy in the Bar-Bench relations but will also help improve Bar standards. Lastly, it will foster unity and integrity of the nation.

The Subordinate Courts

The subordinate Courts will automatically follow with stricter judicial discipline since they are governed by the High Courts. Moreover, the subordinate Judges will be in a position to perform better without any fear or offensive threats from the local Bar by reason of their intimate links with the sitting Judges.

D. CONCLUSION

The constitutional mandate and the evolved jurisprudence regarding the independence of judiciary has always been of rendering fair and bold decisions without any taint of resistance or hesitation. Though nobody can ensure absolute success in the policies regulating human conduct, we must certainly take a step forward in the direction of improvement. In other words, human relations and conduct cannot be arrested but put to restrain. Perhaps, the first move in this regard has already been taken by the Hon'ble Supreme Court when it reportedly directed the immediate transfers while clearing the name of two lawyers Jaishree Thakur and B. S. Walia of Punjab and Haryana High Court to the States of Rajasthan and J&K respectively following their appointments as High Court Judges.[25] Later, Justice Anupinder Singh Grewal was also transferred to Rajasthan High Court from Punjab and Haryana High Court along with the above two Judges within three months of their elevation.

The present collegium system of appointments, if amended in the suggested manner, will prove to be the most successful method of appointing Judges in my view. It is praiseworthy to analyze how the present collegium system with policy of 'no external interference' empowered the Indian judiciary to render some of its boldest judgments against the ruling Government which were previously conspicious by their absence.[26] Depriving judiciary of its independence once again in the garb of NJAC would only emasculate its colossal power to cut the depraved to their size; if not totally shred it into the shackles of political fist. If the suggested scheme of appointments or any other similar scheme is not adopted, the concept of judicial independence in its true sense will always remain unachievable for the cure lies in the disease itself. The judiciary needs internal independence.

Lastly, I would like to quote the legendary Mr. N. A. Palkhivala who said, "if the law is not to be a system of tyrannical rigidity, but instead to be the efficient and useful servant of a changing society, it must from time to time be adapted and parts of it be replaced. A Court of law is like an ancient castle, constantly under repair. There comes a time when it no longer pays to patch it up and it is better to resort to a new, compact house built on modern lines."[27]

25. 'Supreme Court orders transfer of two lawyers'. The Economic Times, August 5, 2014. Can be accessed at http://articles.economictimes.indiatimes.com/2014-08-05/news/52470888_1_two-lawyers-collegium-lower-court-judges

26. Prominent cases include 2G Spectrum scam (2008), Commonwealth Games scam (2010), Coal scam (2012), Adarsh Society scam (2012), among others.

27. Nani A. Palkhivala, 'We, the Nation, The Lost Decades', supra n. 6, at p. 209.